

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: Bruce Gilmore, Claudia McGuire,
The Great Frame Up Systems, Inc., a Delaware
corporation, and Pesger, Inc., an Illinois corporation,
d/b/a The Great Frame Up,

Petitioners.

Case No. 05-1169

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Pursuant to the Court's order of July 15, 2005, the Federal Communications Commission ("FCC") responds to the petition for writ of mandamus filed by Bruce Gilmore, *et al.*, on May 19, 2005. Just over two years ago, Gilmore filed a complaint with the FCC pursuant to a primary jurisdiction referral by a federal district court in which Gilmore had sued his wireless telephone provider. In that suit and in his filing before the FCC, Gilmore alleges that an administrative fee that his wireless telephone provider adds to his bill is unreasonable and discriminatory in violation of the Communications Act.

In his petition for mandamus, Gilmore asks the Court to compel the FCC to issue a decision on his agency filing within 30 days. Petition for Writ of Mandamus (hereafter "Petition") at 8. As we explain below, Gilmore's petition should be denied. Especially given the significant competing demands on its time and resources, the agency has not engaged in unreasonable delay in evaluating and disposing of the multiple factual and legal issues raised by Gilmore's complaint. Moreover, we are informed that the staff has drafted a recommended disposition of Gilmore's complaint that is currently before the Commission for its consideration.

There is accordingly no basis for granting the extraordinary relief of mandamus at this time.

The Commission proposes to report to the Court promptly when the agency acts on Gilmore's complaint and, in any event, within 60 days after the date of this filing.

BACKGROUND

The complaint on which Gilmore seeks a decision began as a putative class action that Gilmore filed in the Cook County Circuit Court in March 2001 and was removed to the United States district court for the northern district of Illinois. *Gilmore v. Southwestern Bell Mobile Systems*, 156 F. Supp.2d 916, 925 (N.D. Ill. 2001). Gilmore, who has a corporate account with Cingular Wireless, a subsidiary of Southwestern Bell, charged in his lawsuit that Cingular unlawfully assessed a "Corporate Account Administrative Fee" against him and other corporate wireless customers. Gilmore claimed that this administrative fee (1) violated Sections 201 and 202 of the Federal Communications Act; (2) violated the state Consumer Fraud and Deceptive Business Practices Act, and (3) constituted a common law fraud. *See Gilmore v. Southwestern Bell Mobile Systems*, Case No. 01-C-2900 (N.D. Ill., July 25, 2002) ("*July 25 Order*") (appended as Exhibit A to petition for writ of mandamus) at 1-2.¹ After the district court twice denied Gilmore's request for class certification, *see Gilmore v. Southwestern Bell Mobile Systems*, 2001 WL 1539157 (N.D. Ill. 2001) at *3-6; *Gilmore v. Southwestern Bell Mobile Systems*, 2002 WL 548704 (N.D. Ill. 2002) at * 4, Gilmore amended his district court complaint to add three additional named plaintiffs. *See July 25 Order* at 4-5.

The district court dismissed the state Consumer Fraud Act and common law fraud claims, 2002 WL 548704 at *11-12, and then referred the alleged violation of the Communications Act

¹ The original complaint misnamed the defendant wireless provider. *Id.* at 1 n.1.

to the FCC under the doctrine of primary jurisdiction. *July 25 Order* at 10-11. In doing so, the court determined that Gilmore's claim under section 201(b) of the Communications Act raised "the issue of whether the Fee was unjust or unreasonable because too high," which was "an issue within the expertise of the FCC." *Id.* at 10-11.²

Upon receipt of the referral order from the court in August 2002, the FCC attempted to mediate a settlement but failed. Petition at 3. Thereafter, Gilmore and the other plaintiffs in the district court litigation filed a 48-page formal complaint with the Commission. (For the Court's convenience, the complaint is attached to this pleading.) The complaint asserted *inter alia* that Cingular's fee was unjust and/or unreasonable in violation of section 201 of the Communications Act and unreasonably discriminatory in violation of section 202 of the Act. Complaint at 17-19.³ The most recent pleading in the FCC's proceeding was filed on September 15, 2003. *Id.* at 2.

ARGUMENT

1. Relief in the nature of mandamus is a "drastic remedy," *Will v. United States*, 389 U.S. 90, 104 (1967), reserved for "really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 258, 260 (1947).⁴ "[T]hose invoking the court's mandamus jurisdiction must have a clear and

² The court initially dismissed the complaint without prejudice to reinstatement following a final decision of the FCC, *id.* at 11-12, but on motion by Gilmore the court reinstated the case and ordered it held in abeyance pending resolution of the FCC proceeding. See "Minute Order" (appended as Exhibit B to the petition for writ of mandamus).

³ Gilmore also alleged that the fee was fraudulent under federal common law and that it constituted a breach of contract as an unwritten modification of Cingular's contract with its customers. *Id.* at 20-22. Later, however, Gilmore conceded that the fraud and breach of contract counts included in the complaint are barred because the Commission does not have jurisdiction to resolve common law causes of action. See "Complainants' Reply to Defendant's Answer and Affirmative Defenses to Complainants' Complaint," filed July 24, 2003, at 8.

⁴ See *In re Brooks*, 383 F.3d 1036, 1041 (D.C. Cir. 2004), quoting *Cobell v. Norton*, 334 F.3d 1128, 1137 (D.C.Cir.2003) (A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations."); *In re United Mine Workers of America*, 190 F.3d 545, 548 (D.C. Cir. 1999), quoting *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986) (same).

indisputable right to relief; and even if the [litigant] overcomes all these hurdles, whether mandamus relief should issue is discretionary.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). The petitioners have failed to show that this case is “one of the exceptionally rare cases,” *In re Barr Laboratories*, 930 F.2d 72, 76 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991), that warrants a judicial decree directing agency action.

As this Court has recognized, “the time agencies take to make decisions must be governed by a ‘rule of reason.’” *See, e.g., Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 90 (D.C. Cir. 1984) (“*TRAC*”). The application of the rule of reason to a claim of unreasonable delay “is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.” *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). A number of factors are relevant, including the “complexity of the task” before the agency, *id.* at 1101, whether the agency is confronted with “competing priorit[ies],” whether there is a “congressional timetable” for action, whether “human health and welfare” are involved, and “the nature and extent of the interests prejudiced by delay.” *TRAC*, 750 F.2d at 80. In the end, however, the “issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful.” *Id.* at 1101.⁵

Here, the agency has not been dilatory, and the time since the complaint was filed pursuant to a primary jurisdiction referral a little more than two years ago is not egregious or

⁵ Gilmore cites this Court’s decision in *In re American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004), for the proposition that “a reasonable time for agency action is typically counted in weeks or months, not years.” Petition at 4. But, as he acknowledges (*ibid.*), the cases he cites found egregious delay only after at least three and as much as six years had passed. In *American Rivers* itself, the petition before the agency “had gone unanswered for more than six years.” 372 F.3d at 414.

unreasonable given the complexity of the matters presented in the complaint and the press of other important Commission business. The Commission has now before it for consideration a draft order disposing of Gilmore's complaint, and the agency proposes to report to this Court promptly when it has acted in this matter and, in any event, within 60 days after the date of this filing. If the agency has not acted within those 60 days, we propose to file status reports at 30-day intervals thereafter.

2. Section 201(b) of the Communications Act declares "unlawful" any "charge, practice, classification, or regulation" imposed "for or in connection with" a common carrier "communications service," and authorizes the Commission to prescribe rules and regulations to carry out its provisions. 47 U.S.C. § 201(b). Section 202(a) of the Act provides that it is unlawful for any common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services." It is well settled that wireless telephone providers such as Cingular are common carriers subject to the reasonableness and non-discrimination obligations of section 201(b) and 202 of the Act. *See, e.g., Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 2907 (2004).

Gilmore's complaint before the Commission, which was not his forum of choice, is based on section 201(b) and section 202 of the Act, and involves three principal allegations. First, Gilmore claims that the corporate administrative fee charged by Cingular is unjust and unreasonable within the meaning of Section 201 of the Communications Act because, according to Gilmore, the fee is not reasonably related to unique or increased corporate account administrative costs, but rather is designed for the sole purpose of raising revenues without appearing to raise rates. Complaint at 18, 23-31. Second, Gilmore claims that the fee is unjust

and unreasonable because it is the product of misleading and deceptive marketing and billing practices. *Id.* at 18, 31-38. And third, Gilmore alleges that the fee is discriminatory in violation of Section 202(a) of the Communications Act because, according to Gilmore, the fee is levied only on certain corporate account customers and not on other customers, and the fee is not charged to non-corporate account customers who receive similar services for their wireless accounts. *Id.* at 18-19, 38-40.

Gilmore contends that the resolution of the issues raised in his complaint to the Commission “is not a complex matter and, in fact, only requires the FCC to make certain findings akin to being a trier of fact.” Petition at 5. That is incorrect. In determining whether Cingular’s surcharge is unjust and unreasonable in violation of Section 201 of the Act, the Commission must examine (1) whether the charge reasonably reflects the carrier’s costs, (2) the consumers’ expectations based on their wireline experience, and (3) the availability of competitive services to which a dissatisfied consumer can turn. *See Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE*, 16 FCC Rcd 11558 (2001).

Likewise, in determining whether the fee is the product of misleading and deceptive marketing and billing practices, the Commission must examine whether Cingular withheld the basic information necessary for consumers to make an educated decision about their service provider, or whether the information was buried in fine print or presented in a way that would mislead customers as to the amount or nature of the surcharge. *See Truth-in-Billing Order*, 14 FCC Rcd 7492 (1999).

Finally, in determining whether the fee is discriminatory in violation of Section 202(a) of the Act, the Commission must examine whether the services at issue are “like” the services

provided to other customers that Gilmore says are favored. If they are, the Commission must determine whether there are differences in the terms or conditions pursuant to which the services are provided; and if so, whether the differences are reasonable. *See Orloff v. Vodafone Airtouch*, 17 FCC Rcd 8987, 8994 (2002), *aff'd*, *Orloff v. FCC*, *supra*, 352 F.2d 415. It requires the expenditure of considerable time and resources to evaluate conscientiously and resolve the factual and legal issues raised by Gilmore's complaint.

Any evaluation of a claim of egregious agency delay must also take account of the agency's discretion to allocate its limited resources among competing priorities of equal or greater urgency. *See In re Barr Laboratories*, *supra*, 930 F.2d at 77; *In re Monroe Communications Corp.*, *supra*, 840 F.2d at 945-46; *TRAC*, 750 F.2d 80.⁶ In this regard, Gilmore's complaint must compete for the attention of the Commission and its staff with many other complex and important matters before the agency during the same time. The Commission takes seriously its responsibilities to dispose of each of the administrative complaints that come before it, many of which are equally as pressing, or more pressing, than that submitted by Gilmore. At the present time, approximately 60 investigations into complaints besides that of Gilmore are pending before the agency.

Moreover, the agency is obliged to fulfill its responsibilities under legislative mandates that have also competed for the agency's immediate attention. Thus, while Gilmore's claims have been pending, the Commission has been obliged to give expedited treatment to far-reaching

⁶ Congress gave the Commission substantial discretion in the timing of administrative action. *See* 47 U.S.C. § 154(j) (Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"). *See also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940) (Administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties").

proceedings for which Congress prescribed explicit time limits for agency action, including numerous forbearance, tariff, and biennial review proceedings.⁷

There is no suggestion that Gilmore's complaint raises issues involving "human health and welfare," where administrative delays might be "less tolerable." *TRAC*, 750 F.2d at 80. Nor does Gilmore suggest that a statutory deadline applies in this case. In any case, this Court has held that even where a clearly applicable statutory deadline has been missed, mandamus will not lie unless the complaining party has shown that the agency abused its discretion to set its own priorities in a busy regulatory regime. *In re Barr Laboratories, Inc.*, *supra*, 930 F.2d at 74.

In sum, as this Court has recognized, "[t]he agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects of each, and allocate its resources in the optimal way." *In re Barr Laboratories*, *supra*, 930 F.2d at 77. The petitioners in this case give the Court "no basis for reordering agency priorities." *Id.* In any event, as we have noted, we are informed that Commission staff has prepared a draft order disposing of Gilmore's complaint that is currently before the Commission for its consideration. We propose to report to this Court promptly when the agency has acted on the complaint, and in any event, within 60 days of the date of this filing. If the agency does not act within those 60 days, we propose to file additional status reports at 30-day intervals thereafter.

⁷ E.g., *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361 (2005) (forbearance); *2004 Biennial Regulatory Review*, 20 FCC Rcd 124 (Wireless Telecommunications Bureau, 2004); *In the Matter of July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd 24937 (2004).

CONCLUSION

Extraordinary judicial intervention in the Commission's internal management of its workload is justified only when agency delay has been "egregious." *TRAC*, 750 F.2d at 80.⁸ Such intervention would be highly inappropriate in this case where the Commission has been engaged in a diligent and ongoing effort to address the issues presented in this case and where a recommended decision is now before the Commission.

The petition for writ of mandamus should be denied.

Respectfully submitted,

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⁸ See *FCC v. Schreiber*, 381 U.S. 279 (1965) ("Congress has left largely to [the Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate the proper dispatch of its business and the ends of justice"); *Nader v. FCC*, 520 F.2d 182,195 (D.C. Cir. 1975) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.").